

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
The Petition of the State of Minnesota )  
Acting by and Through the Minnesota )  
Department of Transportation and the )  
Minnesota Department of Administration, ) CC Docket No. 98-1  
for a Declaratory Ruling Regarding the )  
Effect of Sections 253(a), (b) and (c) of the )  
Telecommunications Act of 1996 on an )  
Agreement to Install Fiber Optic Wholesale )  
Transport Capacity in State Freeway Rights- )  
of-Way )

**Opposition of Ameritech Corporation**

Ameritech Corporation ("Ameritech") submits this Opposition in response to the Commission's Public Notice, DA 98-32, released January 9, 1998 pertaining to the above-captioned Petition. The State of Minnesota, acting through its Departments of Transportation and Administration, is seeking a declaratory ruling that an agreement it entered into with a joint venture consisting of ICS/UCN LLC and Stone & Webster (the "Developer"), which grants to the Developer exclusive rights of access to and use of Minnesota freeways for construction and operation of fiber optic cables, is not subject to preemption under Section 253(d) of the Telecommunications Act of 1996 (the "Act").

Ameritech concurs in the more detailed Opposition and Request to Preempt of the United States Telephone Association<sup>1</sup> which asserts that Minnesota's proposed exclusive grant violates Section 253(a) of the Act and is not a lawful exercise of the authority

<sup>1</sup> *Opposition and Request to Preempt of the United States Telephone Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Western Rural Telephone Association*, Filed 3-9-98.

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reserved to the states under Section 253(b) or (c). Ameritech offers the following additional points in opposition to the Petition and requests that the Commission deny the Petition and preempt Minnesota from proceeding with the proposed exclusive grant of access to freeway rights-of-way.

**I. Minnesota's "Exclusive" Arrangement Is Contrary to Section 253 of the Act.**

Access to public rights-of-way is necessary for any entity to provide facility based telecommunications services. Freeways are particularly desirable forms of public right-of-way for telecommunications facilities for a variety of reasons: they connect major metropolitan areas; they are controlled by a single entity, simplifying right-of-way acquisition compared to alternative routes; and they are relatively free of obstacles which promotes efficient, expeditious construction.

To protect the safety of the motoring public, states administering freeways have been reluctant to make freeways available for longitudinal placement of telecommunications facilities. However, the so-called accommodation policies of many states, including Minnesota, do not completely foreclose the possibility.<sup>2</sup> In the past, Minnesota has applied its Accommodation Policy in such a way as to effectively prohibit use of freeway rights-of-way for telecommunications purposes.<sup>3</sup> Minnesota has now relaxed its prohibition, but only for the Developer, in exchange for significant use of the fiber facilities to be constructed. As such, Minnesota's action is not consistent with the proscriptions of Section 253.

In TCI Cablevision of Oakland County, Inc.<sup>4</sup>, the Commission summarized its decisions regarding application of Section 253 preemption. The first step is to determine

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<sup>2</sup> See Minnesota Department of Transportation Procedures for Accommodation of Utilities on Highway Right of Way ("Accommodation Policy"), July 27, 1990, attached to the Petition.

<sup>3</sup> Petition, pp. 6-8.

<sup>4</sup> TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, FCC 97-331, Pars. 97-98.

under Section 253(a) whether the state or local action prohibits or has the effect of prohibiting any entity from providing a telecommunication service. A state provision has the effect of prohibiting a service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."<sup>5</sup> If a conclusion is reached that a state provision violates Section 253(a), then the state's purported reasons for the provision are examined to determine whether they fall within the provisions of Sections 253(b) or 253(c). To meet the requirements of Sections 253(b) or (c), the provision must be a "necessary to protect public safety or welfare" and be "competitively neutral".

Here, Minnesota's contract with the Developer fails to meet either requirement. First, the agreement gives the Developer the exclusive rights of access to and use of Minnesota's freeway rights-of-way for an extended period of time, 10 years at least. The exclusive nature of the contract effectively prohibits other entities wishing to be facilities based providers from using on equal terms with the Developer these highly desirable rights-of-way. Though Minnesota seeks to immunize its actions under Section 253(b) by requiring the Developer to bury other providers' cables at the time of construction and make use of the fibers available on a non-discriminatory basis, these requirements are poor substitutes to ownership and control of a facility for a provider seeking to distinguish itself in the marketplace on price or quality of service based on superior engineering or operations. While the facility may be available, the ability to manage it better than a competitor is not, nor necessarily is the ability to build it at a lower cost.

Secondly, the exclusive contract is not "necessary to protect public safety or welfare". The sole justification Minnesota offers for limiting the use of the freeways to a single entity is the historic prohibition on use for these purposes coupled with a naked assertion that access must be limited to a single party in order to address concerns

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<sup>5</sup> TCI, Par 98.

regarding the safety of the traveling public and the adverse consequences of congestion.<sup>6</sup> As stated in Commissioner Ness's concurrence in Huntington Park<sup>7</sup> ". . . the mere incantation of concerns with public safety . . . without more, does not immunize a local action against preemptive action." Minnesota has done nothing to justify its decision to limit use of the freeway rights-of-way to a single party beyond its conclusory assertion that only one entity could be allowed access. Given what is withdrawn from other entities wishing to provide facility based telecommunications services, that is an inadequate basis on which to determine that the exclusive contract is necessary to protect public safety. As discussed below, there are numerous non-exclusive ways to protect the public safety in a competitively neutral manner.

Minnesota laudably relaxed its interpretation of its accommodation policy to permit longitudinal telecommunications facilities in freeway rights-of-way. But it should then have sought ways to do so that would be competitively neutral as well as protect the public safety. For example, it simply could have applied the provisions of its Accommodation Policy which does permit longitudinal placements.<sup>8</sup> It could have created annual windows where construction could be simultaneously done by the entities desiring

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<sup>6</sup> Petition, pp. 8 and 30, Affidavit of Lari, Pars 8 and 10.

<sup>7</sup> In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, CCB Pol 96-26, 12 FCC Rcd 14191, FCC 97-251, p. 45.

<sup>8</sup> The Accommodation Policy contains numerous provisions regarding construction and operation of longitudinal facilities in the rights-of-way the purpose of which appears to be to insure the safety of the traveling public. The Accommodation Policy does not itself limit the number of users in a right-of-way. (Ameritech's copy of the Accommodation Policy contains a number deletions and some additions, all marked "Per the Agreement". It is not known whether these are intended to modify the Accommodation Policy as it relates to Minnesota's Agreement with the Developer. The Agreement does reference a "marked version" of the Accommodation Policy at Section 2.75, attached to the Agreement as Exhibit H. Ameritech does not have a complete copy of the Agreement and so cannot conclude that the version of the Accommodation Policy it has is indeed the version appended to the Agreement. If it is, the changes significantly alter the conditions under which the freeway right-of-way may be occupied by the Developer as compared to the unmodified Accommodation Policy. For purposes of the above argument, Ameritech assumes that the Accommodation Policy would apply unmodified.)

access and so avoid the cited safety concerns from congestion or hazards. It could have required all users to form a consortium to fund and operate a single repair entity. It could have specified locations of termini for cables in places that minimize the impact on motorists. It could have required that all facilities be constructed in conduit or innerduct conduit and so be accessible and repairable from controlled points, minimizing the need to enter the right-of-way to make repairs or replacements. It could have rationed access over time and place in a manner less draconian than an exclusive grant to the Developer.

As shown above, there are many ways to address the public safety issues that do not impact competitive neutrality to the extent Minnesota's approach does. Minnesota has made available some 2000 miles of some of the most useful and desirable right-of-way from a facility based provider's perspective, only to withdraw it and award it to one entity, based on a conclusory determination that public safety warrants it. This does not meet the "necessary" or the "competitive neutrality" tests of Section 253.

## **II. Minnesota's "Exclusive" Arrangement Is Also Inconsistent With Section 253(c).**

Finally, Minnesota asserts that its decision to award the exclusive contract is a right-of-way management decision under Section 253(c) that "rests solely within the discretion of the state."<sup>9</sup> Section 253(c) preserves a state's police power authority to "manage" and obtain "compensation" for the use of public rights-of-way by telecommunications carriers. However, such appropriate police power rights must be exercised "on a competitively neutral and nondiscriminatory basis." As shown above, the "exclusive" arrangement proposed by Minnesota fails to meet these statutory requirements.

In essence, what Minnesota attempts to do is to use its police power control of freeway rights-of-way to create a scarce resource by determining that its capacity is limited to one entity. It then auctions off that resource to the highest bidder, in exchange

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<sup>9</sup> Petition, p. 30.

for substantial recompense for the state. There can be no facilities based competition unless there is equivalent access to public rights-of-way by all entities wishing to be facility based providers. While normally the Commission should defer to local authorities in regard to police power determinations, those that regard access to public rights-of-way should be scrutinized carefully to ensure that the pro-competitive policies of the Act are not thwarted. This scrutiny should especially apply to determinations, such as the one at issue here, that limit access to public rights-of-ways, as opposed to those that control the use of public rights-of-way.<sup>10</sup>

### III. Conclusion

Because Minnesota's proposed exclusive contract is not competitively neutral and will have the effect of prohibiting the provision of telecommunications services and is neither necessary to protect public safety nor a reasonable exercise of management of rights-of-way, the Commission should deny Minnesota's petition and instead preempt the exclusive contract under Section 253(d) to the extent necessary to remove barriers to entry.

Respectfully submitted,

Ameritech Corporation

By: Gerald A. Friederichs  
Gerald A. Friederichs

Attorney for Ameritech Corporation  
Ameritech Center  
2000 W. Ameritech Center Drive  
Hoffman Estates, IL 60196

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<sup>10</sup> See TCI at Par 103.